



The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Cleary Cleaners, LLC
7 Gonic Road
Rochester, NH 03867

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 04-055**

July 16, 2004

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("DES") to Cleary Cleaners, LLC pursuant to RSA 147-A:17-a and Env-C 601.05. DES is proposing that fines totaling \$62,000 be imposed against Cleary Cleaners, LLC for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Waste Management Division ("Division") is a duly constituted administrative agency of the State of New Hampshire, having its principal offices at 29 Hazen Drive, Concord, NH.
2. Cleary Cleaners, LLC ("Cleary") is a New Hampshire corporation that registered with the New Hampshire Secretary of State's Office on November 18, 1999. Cleary has a mailing address of 7 Gonic Road, Rochester, NH.

III. STATEMENT OF FACT AND LAW SUPPORTING CLAIM

1. Pursuant to RSA 147-A, DES regulates the management and disposal of hazardous waste. Pursuant to RSA 147-A:3, the Commissioner of DES has adopted Env-Wm 100-1100 ("Hazardous Waste Rules") to implement this program.
2. Pursuant to RSA 147-A:17-a, the Commissioner of DES is authorized to impose fines of up to \$2,000 per violation for violations of RSA 147-A or rules adopted pursuant thereto. Pursuant to this section, the Commissioner has adopted Env-C 612 to establish the schedule of fines for such violations.
3. Cleary is a hazardous waste generator that notified the United States Environmental Protection Agency ("EPA") of its activities through DES on July 25, 1985. EPA Identification Number NHD981070196 was assigned to Cleary's site located at 7 Gonic Road, Rochester, NH.
4. On February 6, 2003, DES conducted an inspection of Cleary. The purpose of the inspection was to determine Cleary's compliance with RSA 147-A and the Hazardous Waste Rules.

5. During the Inspection, DES personnel observed hazardous wastes stored in the outdoor hazardous waste storage area and in the "Dry Cleaning Area" located adjacent to three (3) 80-pound dry cleaning machines.
6. Env-Wm 502.01 requires a generator of a waste to determine if the waste is a hazardous waste.
7. At the time of the Inspection, no formal hazardous waste determination had been performed on the waste lamps generated by Cleary. DES personnel also confirmed that Cleary has disposed of waste lamps in the on-site dumpster.
8. Env-Wm 509.02(a)(1), which references 40 CFR Part 265.15, General Inspection Requirements, requires full quantity generators to conduct inspections of the Facility, including the hazardous waste storage area, and to document the inspections.
9. At the time of the Inspection, Cleary was not conducting and documenting inspections of the outdoor hazardous waste storage area and the "Dry Cleaning Area."
10. Env-Wm 509.02(a)(2), which references 40 CFR Part 265.16, Personnel Training, requires full quantity generators to maintain a personnel training program for its employees responsible for handling hazardous waste.
11. At the time of the Inspection, Cleary did not have a personnel training program and was not providing hazardous waste training to emergency coordinators and employees responsible for handling hazardous waste.
12. Env-Wm 509.02(a)(5), which references 40 CFR Part 265, Subpart D, Contingency Plan and Emergency Procedures, requires full quantity generators to maintain a contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.
13. At the time of the Inspection, Cleary did not have a hazardous waste contingency plan. Documents entitled "*Hazard Communication Program*" and "*OSHA Safety/Meeting Minutes*" were made available, but did not address the requirements for a contingency plan.
14. Env-Wm 509.02(c)(3) requires generators to provide security measures at all outdoor hazardous waste storage areas. Required security measures include posting a sign with the legend, "Danger-Unauthorized Personnel Keep Out" at each entrance to the hazardous waste storage area.
15. At the time of Inspection, Cleary's outdoor hazardous waste storage area did not have a sign posted with the legend "Danger- Unauthorized Personnel Keep Out".
16. Env-Wm 509.03(d), which references Env-Wm 507.01(a)(3), requires generators to ensure that containers storing hazardous waste be closed at all times, except when waste is being added to or removed from the containers.

17. During the Inspection of Cleary's Dry Cleaning Area, the one (1) satellite accumulation container of hazardous waste "Lint with Perchloroethylene/water mixture" and the one (1) satellite accumulation container of hazardous waste "Perchloroethylene" were not closed.

18. Env-Wm 509.03(g) requires all satellite storage containers used for the storage of hazardous waste be marked with the following information at the time they are first used to store wastes: the words "hazardous waste" and words that identify the contents of the container.

19. During the Inspection of Cleary's Dry Cleaning Area, the one (1) satellite accumulation container of hazardous waste "Lint with Perchloroethylene/water mixture" and the one (1) satellite accumulation container of hazardous waste "Perchloroethylene" were not marked with the words "hazardous waste" and words that identify the contents of the container.

20. Env-Wm 510.02 (d) requires that the generator retain one (1) copy of the manifest, give five (5) copies to the transporter, and forward one (1) copy to the destination state and one (1) copy to DES within five (5) days of shipment.

21. At the time of the Inspection, Cleary had on file the following nine (9) hazardous waste manifests that had not been submitted to DES:

- (a) Manifest No. MAM929228, dated 4/11/01
- (b) Manifest No. MAM971511, dated 7/19/01
- (c) Manifest No. MAM982618, dated 8/31/01
- (d) Manifest No. MAM990553, dated 10/9/01
- (e) Manifest No. MAM996490, dated 11/1/01
- (f) Manifest No. MAQ010167, dated 11/21/01
- (g) Manifest No. MAQ096983, dated 12/3/01
- (h) Manifest No. MAQ104127, dated 12/18/01
- (i) Manifest No. MAQ205438, dated 11/11/02

22. As a result of the violations of the Hazardous Waste Rules observed during this inspection, DES issued Administrative Order No. WMD 03-15 ("Order") to Cleary on July 11, 2003.

23. On August 22, 2003, DES issued an Administrative Fine by Consent No. AF 03-033 ("Agreement") to Cleary that detailed the basis of the fines and the terms of settlement that was acceptable to DES. A settlement meeting was held with Cleary on September 24, 2003.

24. DES notified Mr. Cleary in a letter dated December 2, 2003 that a review of Cleary's written responses to the Order submitted on August 29, 2003 and September 29, 2003, revealed that not all of the violations outlined in the Order have been adequately addressed.

25. The letter of December 2, 2003, advised Cleary that per Env-C 612.03(f)(2) failing to achieve compliance with provisions of an Order by the specified deadline can result in an additional administrative fine of \$2,000 per calendar month, or portion thereof, for each provision of the Order that is not complied with. The Order dated July 11, 2003 allowed sixty (60) days to correct the two deficiencies identified below. The sixty (60) day deadline was September 11, 2004.

- a. Section E., Item #3, of the Order required Cleary to develop and maintain a personnel training program as specified in Env-Wm 509.02(a)(2), which references 40 CFR 265.16, Personnel Training, within sixty (60) days of the Order.
- b. Section E., Item #4, of the Order, required Cleary to prepare and maintain a current site specific contingency plan as specified in Env-Wm 509.02(a)(5), which references 40 CFR 265 Subpart D, Contingency Plan and Emergency Procedures, within sixty (60) days of the Order.

26. On March 11, 2004, DES personnel contacted Mr. Cleary (General Manager) by telephone and notified him that there were still two outstanding compliance issues in the Order issued on July 11, 2003, that have not been fully resolved. Mr. Cleary stated that he would send in the required documentation by March 16, 2004. When no response was received from Mr. Cleary, DES personnel called Mr. Cleary on March 26, 2004 and April 9, 2004, and left a message for Mr. Cleary to return the call. No response has been received as of the date of this notice.

27. On April 23, 2004, a letter was sent via certified mail to give notice to Cleary that DES has withdrawn the settlement offer for the administrative fine that was proposed to Cleary in the Agreement issued on August 22, 2003.

28. As of the date of this Notice, Cleary has not achieved compliance with the Order. Mr. Cleary has been unresponsive to DES in regards to the requirements specified in Section III, Paragraph 10 and 12.

IV. VIOLATIONS ALLEGED; PROPOSED ADMINISTRATIVE FINES

1. Cleary has violated Env-Wm 502.01 by failing to determine if its lamp waste is a hazardous waste. For this violation, Env-C 612.05(a) authorizes a fine of \$1,500 per determination. However, because this is not a Class I violation, the Division is not seeking a fine for the violation at this time.
2. Cleary has violated Env-Wm 509.02(a)(1) by failing to conduct inspections of the Facility, including the outdoor hazardous waste storage area and the "Dry Cleaning Area." For this violation, Env-C 612.07(a) authorizes a fine of \$1,000 per inspection per area, for a potential fine of \$312,000. At this time, the Division is seeking a fine for failing to conduct inspections at one (1) hazardous waste storage area for twenty-five (25) weeks, a total fine of \$25,000.
3. Cleary has violated Env-Wm 509.02(a)(2) by failing to maintain a personnel training program and to adequately train all emergency coordinators and personnel handling hazardous waste. For this violation, Env-C 612.07(b) authorizes a fine of \$1,750 per individual not trained for initial training, for a potential fine of \$7,000. In addition, Env-C 612.03(f)(2) authorizes a fine of \$2,000 per calendar month that the personnel training program, as specified in Env-Wm 509.02(a)(2), is not prepared or implemented, after the deadline specified in writing by DES, for a potential fine of \$14,000. For this violation, the Division is seeking a total fine of \$21,000.

4. Cleary has violated Env-Wm 509.02(a)(5) by failing to maintain a contingency plan at the Facility. For this violation, Env-C 612.07(e) authorizes a fine of \$2,000 for failing to maintain a contingency plan at the Facility. In addition Env-C 612.03(f)(2) authorizes a fine of \$2,000 per calendar month that the contingency plan is not prepared or implemented after the deadline specified in writing by DES, for a potential fine of \$14,000. For this violation, the Division is seeking a total fine of \$16,000.
5. Cleary has violated Env-Wm 509.02(c)(3) by failing to post a sign with the legend "Danger-Unauthorized Personnel Keep Out" at the outdoor hazardous waste storage area. For this violation, Env-C 612.07(i) authorizes a fine of \$1,750 per area. However, because this is not a Class I violation, the Division is not seeking a fine at this time for this violation.
6. Cleary has violated Env-Wm 509.03(d) by failing to close all hazardous waste satellite containers except to add or remove waste. For this violation, Env-C 612.07(j) authorizes a fine of \$1,000 per satellite storage area. However, because this is not a Class I violation, the Division is not seeking a fine at this time for this violation.
7. Cleary has violated Env-Wm 509.03(g) by failing to mark hazardous waste satellite storage containers with the words "hazardous waste" and words that identify the contents of the container at the time they are first used to store wastes. For this violation, Env-C 612.07(j) authorizes a fine of \$1,000 per satellite storage area. However, because this is not a Class I violation, the Division is not seeking a fine at this time for this violation.
8. Cleary has violated Env-Wm 510.02(d) by failing to submit copies of nine (9) hazardous waste manifests to DES. For this violation, pursuant to Env-C 610, the Division has calculated a fine of \$500 per shipment. However, because this is not a Class I violation, the Division is not seeking a fine at this time for this violation.

The total fine being sought is \$62,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Cleary has the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, September 13, 2004, at 1:00 p.m.** in **Room C-110** of the DES offices at **29 Hazen Drive** in Concord, NH. **Pursuant to Env-C 601.06, Cleary is required to respond to this notice.** Please respond **no later than August 13, 2004**, using the enclosed colored form as follows:

1. If Cleary plans to attend the hearing, please sign the appearance (upper portion) and return it to the DES Legal Unit, as noted on the form.
2. If Cleary chooses to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.
3. If Cleary wishes to discuss the possibility of settling the case, please sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Cleary's interest in settling.

Cleary is not required to be represented by an attorney. If Cleary chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If Cleary wishes to have a hearing but are unable to attend as scheduled, Cleary must notify the DES Legal Unit at least one week in advance of the hearing and request that the hearing be rescheduled. If Cleary does not notify the DES Legal Unit in advance and do not attend the hearing, the hearing will be conducted in Cleary's absence in accordance with Env C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, DES must prove, by a preponderance of the evidence, that Cleary committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If DES proves that Cleary committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Cleary proves, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** Cleary did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Cleary did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Cleary was making a good faith effort to comply with the requirement that was violated.
3. Cleary has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Cleary's case which was not known to DES at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, DES will present testimony and evidence to try to prove that Cleary committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Cleary's opportunity to present testimony and evidence that Cleary did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Cleary has any evidence, such as photographs, business records or other documents, that believes show that Cleary did not commit the violation(s) or that otherwise support Cleary's position, Cleary should bring the evidence to the hearing. Cleary may also bring witnesses (other people) to the hearing to testify on Cleary's behalf.

If Cleary wishes to have an informal meeting to discuss the issues, Cleary must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Cleary has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY
Anthony P. Giunta, P.G.
Director
Waste Management Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Gretchen R. Hamel, Administrator, DES Legal Unit
Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
John Duclos, DES WMD
Tod Leedberg, DES WMD
Linda Birmingham, DES WMD

***** RETURN THIS PAGE ONLY *****

**CLEARY CLEANERS, LLC IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN AUGUST 13, 2004

APPEARANCE On behalf of Cleary Cleaners, LLC

_____ I will attend the hearing scheduled for **Monday, September 13, 2004**, at **1:00 p.m.** in Room C-110 of the DES offices at 29 Hazen Drive in Concord, NH.

Signature

Date

Name (please print or type):

Title:

Phone Number:

WAIVER OF HEARING On behalf of Cleary Cleaners, LLC

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$62,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If you pay by check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type):

Title:

Phone Number:

RETURN THIS PAGE ONLY TO:

**Department of Environmental Services ~ Legal Unit
Attn: Michael Sciafani, Legal Assistant
29 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095**

ENVIRONMENTAL Fact Sheet



6 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.state.nh.us

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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.